COURT FEE 5 RS. भारत INDIA पांच रुपये FIVE RUPEES CANCELLED

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(1) (1)

IN THE HIGHCOURT OF CHHATTISGARH OF JUDICATURE AT BILASPUR(CG) Single Bench

(Misc Appeal No. 238 of 2005)

APPELLANT/ PLAINTIFF

Telecommunications Consultants India Ltd.
having its Corporate Office at
TCIL Bhawan, Greater Kailash I
New Delhi

VERSUS

RESPONDENTS/ DEFENDENTS :

1. Govt. of Chhattisgarh
Panchayat & Rural Development Department Chhattisgarh Rural Road Development Agency Civil Lines, Raipur

2. Punjab & Sindh Bank
18 D, 6 Scindia House,
New Delhi – 110001

Diary No. 5211/05 Presented by Shri Manmeet Singh dated 21.02.05

RECEIVED COPY 21.2.05 CLERK to A. G. BILASPUR

MEMORANDUM OF APPEAL UNDER ORDER 43 RULE 1 READ WITH SECTION 104 OF THE CODE OF CIVIL PROCEDURE

Most Respectfully Showeth:

Misc Civil Appeal u/o 43(1)(r) of CPC

Being aggrieved by order passed by Hon'ble VIII Additional District Judge Raipur, in Civil suit No 1A/05 between M/s Telecommunications Consultants India Ltd , passed on 15.02.05, on the application of the plaintiff u/o 39 R 1&2 of CPC .This Misc Civil Appeal is being preferred under the following facts & law.

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HIGH COURT OF CHHATTISGARH AT BILASPUR

M.A. No. 238/2005

Appellant : Telecommunication Consultants India Ltd.

Versus

Respondents : Govt. of Chhattisgarh & another

Shri Shivram, advocate with Shri A.K.Gupta, counsel for the appellant.

Shri Akhil Agrawal, P.L. for the State

JUDGMENT

(Passed on 09 -3-2005)

This appeal has been preferred by the appellant/plaintiff against the order dated 15/02/2005 in Civil Suit No. 1-A/2005 passed by Additional District Judge, Raipur rejecting the application filed by the plaintiff under Order 39 Rule 1 and 2 of CPC for temporary injunction.

2. The appellant/plaintiff filed the Civil Suit on the averment that its offer for construction and maintenance of rural roads under Pradhan Mantri Gram Sadak Yojna for the year 2003-2004 (Part-II) and year 2004-2005 in district Kanker was accepted and the plaintiff submitted its own bank guarantee for a sum of Rs. 33, 31,036.80 for the contract value of the tender. However, the work could not commence as the area pertaining

to work was disturbed because of the naxalite activities affecting the maintenance of law and order which is a bounden duty of defendant No.1 and as it failed to do so, a suit for perpetual injunction was filed before the District Judge, Raipur seeking restraint against invocation and encashment of the bank guarantee dated 12/05/2004 and against forfeiture of the earnest money. An application for temporary injunction was filed under order 39 Rule 1 and 2 of CPC.

3. Learned trial Court dismissed the application for temporary injunction by the impugned order and hence this appeal has been preferred.

4. Learned counsel for the appellant has challenged the impugned order basically on the ground that the appellant could not perform his part of agreement due to the naxalite problem affecting the work of construction of roads as per the agreement and it was the duty of the respondents under Clause 11 of the General conditions of the contract to ensure safety.

5. It is argued that the bank guarantee in question is a conditional bank guarantee and the amount could be payable only in case of loss or damage caused to or suffered by the Government by reason of any breach by the appellant and that the invocation of the bank guarantee in question was not strictly in terms of the guarantee as the letter invoking bank guarantee did not state the exact loss and damages caused to or suffered by the Government of Chhattisgarh and for this reason invocation of bank guarantee is bad in law, illegal and wrongful.

6. Learned counsel for the appellant further submitted that while invoking the bank guarantee the respondent No.1 has also forfeited the earnest money deposited by the appellant which is contrary to the Clause 16 of the instructions to bidders. It is further submitted that because of the naxalite menace the State Government of Chhattisgarh could not award the second part of the project to any other party as no body was coming forward to execute the work. On the other hand, counsel for the respondent No.1 submits that the Bank/respondent No.2 was a necessary

party before the trial Court and notice of the suit and the applications so filed were never served to respondent No.2 and in the absence of defendant No.2 who is responsible to honour the bank guarantee, no order for temporary injunction could be passed in favour of the appellant. Learned counsel for the State further submitted that the very language of the bank guarantee, which is Annexure A-6 to the appeal, goes to show that the bank guarantee was unconditional and it was issued by respondent No.2 in favour of the plaintiff and the same was duly encashed. Vide communication dated 23/01/2005 as the plaintiff failed to perform the execution of work under the agreement causing a fundamental breach of the contract, the defendant No.2 was called upon to deposit the value of the bank guarantee issued in favour of the plaintiff and deposit the same in the account of the Chhattisgarh Rural Road Development Agency, immediately. It was also submitted by respondent No.1 that the appellant/plaintiff did not start the work even after the execution of the agreement though the time allowed for completion of the said work was only eight months excluding rainy season and before terminating the agreement number of notices were issued to the plaintiff for non performance of their part of the contract and because of this non-execution of the work by the plaintiff the developmental work in the tribal area of the State of Chhattisgarh has been hampered and therefore according to the counsel for respondent No.1, the contract was rightly terminated and the bank guarantee was invoked as per the terms and conditions of the contract and the same could not be stayed.

7. The first contention of the counsel for the appellant that the bank guarantee in question is a conditional bank guarantee, has to be examined first. The relevant excerpts of bank guarantee are reproduced as under :

> *We, Punjab and Sind Bank do hereby undertake to pay the amount due and payable under this Guarantee without any demure merely on a demand from the Employer/Engineer stating that the amount claimed is due by way of loss or damage caused to or would be*

caused to or suffered by the Government by reason of breach by the said conractor(s) of any of the terms and conditions contained in the said Agreement of by reason of the said Contractor(s) failure to perform the said agreement. Any such demand made on the Bank shall be conclusive as regards amount due and payable by the Bank under this guarantee. However, our liability under this guarantee shall be restricted to an amount not exceeding Rs. 33,31,036.80 (Rupees Thirty three lacs thirty one thousand thirty six and paise eighty only).

We undertake to pay to the Government any money so demanded by the Executive Engineer notwithstanding any dispute or disputes raised bythe contractor(s) in any suit or proceedings pending before any Court or tribunal relating thereto our liability under this present being absolute and unequivocal.

The payment so made by us under this bond shall be valid discharge of our liability for payment thereunder and the contractor(s) shall have no claim against us for making such payment.

8. Learned counsel for the appellant heavily relies on the judgment of Supreme Court in the matter of **Hindustan Construction Company Ltd. Vs. State of Bihar & Others reported in (1999) 8 SCC 436** and submits that stipulations in the present bank guarantee are identical to the stipulations in the case cited by him where the Apex Court has held that stipulation in that case would not be said to be unconditional or unequivocal and as such the defendants could not be said to have had an unfettered right to invoke that bank guarantee and demand immediate payment thereof from the bank.

9. Learned counsel for the respondent No.1 referring to paragraph 12 of the said judgment contends that the terms under which the bank guarantee was issued in that case are different to those of the bank

guarantee in the present case. Relevant portion of the bank guarantee in that case is reproduced as under :

> *We State Bank of India, incorporated under the State Bank of India Act, 1955, and having one of our branches at Nyayamurti C.N.Vaidya Marg, Fort, Bombay-400023 (hereinafter referred to as 'the said Bank'), as instructed by the contractor, agree unconditionally and irrevocably to guarantee as primary obligator and not as surety merely, the payment of the Executive Engineer, Kharkai Dam Division II, Icha, Chaliama, Post Kesargarhia, District Singhbhum, Bihar, on his first demand without whatsoever right of objection on our part and without his first claim to the contractor, the amount not exceeding Rs. 10,00,000- (Rupees ten lakhs only) in the event that the obligations expressed in the said Clause of the above- mentioned contract have not been fulfilled by the contractor giving the right of claim to the employer for recovery of the whole or part of the advance mobilization loan from the contractor under the contract.*

10. Thus, comparing the stipulations in both the performance bank guarantees, it is manifestly clear that as per the bank guarantee in the present case, the defendant No.2 has undertaken to pay the amount due and payable under this guarantee on demand and that any such demand made on the bank shall be conclusive as regards amount due and payable by the bank though not exceeding Rs. 33,31,036.80.

11. Thus, the case cited by the appellant is not applicable in the present set of facts because the Apex Court taking into consideration the subsequent stipulations has held that bank guarantee in that case was a conditional bank guarantee whereas the stipulation in the bank guarantee of the present case leaves no room to the bank as it has undertaken to honour the demand made by the Executive Engineer as conclusive as

regards the amount due and payable by the bank under the guarantee notwithstanding any dispute or disputes raised by the contractor in any suit or proceedings pending before any Court or tribunal relating thereto and the liability of defendant No.2 under the present being absolute and unequivocal.

12. Learned counsel for the respondent relying on the judgment in the matter of **Daewoo Motors India Ltd. Vs. Union of India & Other reported in (2003) 4 SCC 690** submits that the stipulation in the bank guarantee in the case under reference is identical to the present case and the Hon'ble Apex Court has held such stipulation to be unconditional and irrevocable and the bank guarantee could not be invoked by the respondents and the bank is liable to encash the same and the terms of the contract have no relevance.

13. He particularly referred to paragraph 10 of the above judgment. In that case also it was argued that there was a stipulation that the bank guarantee is encashable in breach of the terms of the contract by the Daewoo Motors India Ltd. and its contention was not accepted. As the quoted words cannot be read in isolation, in the present case also though there is such identical stipulation but the same cannot be read in isolation because subsequently the bank has undertaken to honour the bank guarantee as and when invoked by the Executive Engineer irrespective of any objection or any stipulation in the agreement.

14. Thus, the contention of the appellant that the bank guarantee in question is a conditional bank guarantee has no force.

15. The second objection raised by the appellant is that the bank guarantee in the present case categorically states that the Executive Engineer was duty bound to state in his letter invoking the bank guarantee that the amount claimed is due by way of loss or damages caused to or suffered by the Government by reasons of breach by the said contractor. However, the letter dated 23/01/2005 written by the Executive Engineer invoking the bank guarantee does not fulfill the above criteria as by this letter it has not been stated by the Executive Engineer regarding the

quantification of the amount claimed by way of loss or damages caused to or suffered by the Government or that in the absence of any such stipulation the bank guarantee is bad in law and for this reason also the encashment of bank guarantee has to be stayed by the order of temporary injunction. In support of this contention he relies on the judgment of the Apex Court in the matter of **National Highway Authority of India Vs. Ganga Enterprises and Another reported in AIR 2003 SC 3823** where the Court held that if the enforcement is in terms of the guarantee, then the Courts must not interfere with the enforcement of the bank guarantee. Relevant portion of the said judgment is being reproduced as under :

> *In our view, the High Court fell in error in so holding. By invoking the Bank guarantee and/or enforcing the bid security there is no statutory right, exercise of which was being fettered. There is no term in the contract which is contrary to the provisions of the Indian Contract Act. The Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It*

must be remembered that, particularly in Government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there even a person who does not have the capacity or a person who has not intention of entering into the contract will make a bid. The whole purpose of such a clause i.e. to see that only genuine bids are received would be lost if forfeiture was not permitted.

There is another reason why the impugned judgment cannot be sustained. It is settled law that a contract of guarantee is a complete and separate contract by itself. The law regarding enforcement of an "on demand Bank guarantee" is very clear. If the enforcement is in terms of the guarantee, then Courts must not interfere with the enforcement of Bank guarantee. The Court can only interfere if the invocation is against terms of the guarantee or if there is any fraud. Courts cannot restrain invocation of an "on demand guarantee" in accordance with its terms by looking at terms of the underlying contract. The existence or non existence of an underlying contract become irrelevant when the invocation is in terms of the Bank guarantee. The Bank guarantee stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The Bank guarantee was enforced before the bid was withdrawn within 120 days. Therefore, it could not be said that the invocation of the Bank guarantee was against the terms of the Bank guarantee. If it was in terms of the Bank guarantee, one fails to understand as to how the High Court could say that the guarantee could not have been invoked. If the

guarantee was rightly invoked, there was no question of directing refund as has been done by the High Court.

16. In the instant case, the bank guarantee has been invoked within the terms of bank guarantee and it is not open to the plaintiff or the bank to question the encashment on the ground of some condition of the agreement.

17. The other objections of the appellant at this stage cannot be considered as the issue involved in the present appeal is whether the respondent No.1 can be restrained by an order of temporary injunction from encashing the performance bank guarantee that has been issued in its favour by defendant No.2 at the instance of the plaintiff and on the aforesaid condition I am satisfied that the learned Additional District Judge has not committed any illegality by rejecting the application for temporary injunction preferred by the appellant and thus the appeal preferred by the appellant is devoid of any merit and the same is liable to be dismissed.

18. Consequently, the appeal is dismissed and the stay granted earlier stands vacated.

Sd/-
Dhirendra Mishra
Judge

Jyotishi